No. 839

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

PLYMOUTH MANUFACTURING CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

PLYMOUTH MANUFACTURING CORP., ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Circuit Court of Appeals for the Seventh Circuit on December 3, 1943.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the District Court are printed at R. 405–409. The opinion of the District Court (R. 410–411) is reported in 46 F. Supp. 433. The opinion of the Circuit Court of Appeals (R. 428–435) is reported in 139 F. (2d) 178.

JURISDICTION

The judgment of the circuit court of appeals was entered December 3, 1943. A petition for rehearing was filed within due time (R. 436) but was denied by the court on January 3, 1944 (R. 437). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The defendants, a "one-man" corporation, its president who owned virtually all its stock, and its four other officers, devised and put into effect, "with the avowed intention, to avoid the impact on the business of the corporation, of the Fair Labor Standards Act" (R. 411), arrangements designed to convert the workers employed by the corporation into "partners" not entitled to the benefits of the Act. Under these arrangements, the defendants continued to control the business and the status of the workers was not changed in substance. The question presented is whether the workers were employees of the defendants within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 3. As used in this Act—
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> * * * * *
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> (d) "Employer" includes any person acting directly or indirectly in the interest

of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

STATEMENT

Petitioner, Administrator of the Wage and Hour Division, United States Department of Labor, brought this suit for an injunction to enforce the Fair Labor Standards Act against the Plymouth Manufacturing Corporation, Samuel Tomlinson and Hubert Tanner, and William H. Wolfarth, Hubert Tanner, George E. Warren and Chester H. Thompson, described as co-partners, doing business as the Plymouth Manufacturing Company (R. 30). The facts, none of which are disputed, are as follows:

(1) *The management of the business.*—Prior to October 1938, when the Fair Labor Standards Act became effective, the defendant, Plymouth Manufacturing Corporation, of Plymouth, Indiana, was engaged in the business of manufacturing boxes and other containers for shipment in interstate commerce (R. 131–132). It employed from 30 to 60 or more workmen (R. 132).

Defendant Tomlinson was the president and treasurer of the corporation, and owned directly 315 and indirectly 96 of the 416 shares of stock outstanding (R. 130–133).[1] It was stipulated that he was "dominant in the direction and management of its corporate and business affairs" (R. 42).

The defendant Tanner, Tomlinson's son-in-law, was secretary and assistant treasurer of the corporation, defendant Wolfarth assistant president, defendant Warren assistant secretary and defendant Thompson plant superintendent (R. 130–133).

After the passage of the Act and shortly before its effective date, the defendants Tomlinson, Tanner, Wolfarth, Warren, and Thompson attended several meetings of the employees called by the management of the corporation (R. 234–237, 246–248, 254, 274–276). At these meetings Tomlinson asserted, "if the wage and hour law went into effect he would have to close the shop" (R. 236) and that "he could not and would not pay overtime" (R. 225, 239–240, 248). Thereupon, for the conceded purpose of escaping the impact of the Fair Labor Standards Act, the corporation (acting through Tomlinson and Tanner) on October 10, 1938, leased its real estate and equipment to Tanner, Wolfarth, Warren, and Thompson, and assigned to them all supplies and orders (R. 81–

[1] Of the five shares not owned or controlled by Tomlinson one each was owned by the other four individual defendants and the remaining share by a nephew of Tanner's (R. 130–131, 133).

85).[2] The corporation was to receive a rental of 70% of the profits realized by the lessees or their subtenants or licensees on any business conducted on the premises (R. 83), and the lessees or their subtenants were given the right to use the name Plymouth Manufacturing Company (R. 84). The corporation agreed to finance the lessees at 6% interest (R. 83–84).

Two days later the management of the corporation called a meeting of the employees and informed them that a partnership agreement had been drawn up "for their consideration" (R. 278). The employees were informed at and after the meeting that they "would have to sign it" if they "wanted to work there" (R. 267).

On October 22 articles of partnership were signed in which Tanner, Wolfarth, Warren, and Thompson were designated as senior partners, with full management authority, and the employees as junior partners (R. 85–92). The articles provided that the partnership would sublease from the four "senior partners" the land and equipment which they had leased from the corporation, assuming all their obligations. The senior partners retained the right to terminate the lease, and they alone had the right to dissolve the partnership, to admit junior partners and to terminate the partnership as to any particular junior partner. (*Ibid.*)

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[2] The lease was terminable by either party on thirty days' notice (R. 84, 99).

Profits were to be divided 70% to the corporation, 10% to the four senior partners, 10% to the junior partners and 10% as a reserve fund (R. 87, 90, 91). The employees had previously been advised by Tomlinson that they would not be "involved in any indebtedness" (R. 255).[3] On November 7, 1939 the partnership articles were amended so as to abolish the distinction between senior and junior partners "save as to drawing accounts and division of profits" (R. 93–95). The amendment vested management in a Board of Control consisting of six partners elected one every six months, but the amendment designated the four senior partners as members of the original Board with the longest tenure (*ibid.*). Tomlinson and the lessees Tanner, Wolfarth, Warren, and Thompson retained the right to cancel the lease upon which the existence of the business depended (R. 99) and thus kept the enterprise under their control. The four senior partners, in accordance with the original plan (R. 133, 151), continued to perform their executive functions in running the business (R. 137–138).

In July 1941, on the eve of a strike of the workers and when state and federal officials were threatening to collect Social Security taxes (R. 157) [4] the Board of Control executed a "Contract

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[3] One of the defendant's attorneys recommended, however, that the employees could "protect" themselves against partnership creditors by transferring their property to their wives (R. 237).

[4] See note 12, *infra*, p. 13, and *Tomlinson* v. *Smith*, 128 F. (2d) 808 (C .C. A. 7).

for Possession and Management under Mortgage" which designated Tomlinson as trustee for the benefit of creditors (R. 105–111). The creditors at the time this occurred consisted of the Plymouth Corporation, which was obligated by the original agreement to finance the business (R. 83–84), to the extent of $38,160 and a bank to the extent of $27,000, with Tomlinson surety on the total amount (R. 106). Tomlinson signed the contract on behalf of the bank, the corporation and himself (R. 111). Tomlinson as trustee was given complete power to manage the business of the firm, with all the authority of the Board of Control except the right to admit and exclude partners and to fix rates of pay (R. 108). But the agreement separately authorized him to reduce the rates of pay "if at any time there be insufficient funds available to disburse to the membership of the firm [the employees] their several drawing accounts [their wages]" (R. 110). Hubert Tanner was appointed deputy trustee to act in Tomlinson's absence (R. 327).

In the same month the lease was modified so as to require the business to pay to the Plymouth Corporation a rental of 5% of the gross sales instead of 70% of the profits (R. 98). During the first two years there had been no profits; for 1940 70% of the profits was slightly less and for 1941 slightly more than 5% of the gross sales (R. 380–381). Throughout the period the corporation provided the partnership with the necessary funds, and the affairs of the partnership were

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discussed at corporation meetings (R. 157). The corporation purchased materials for the partnership, bought machinery for the factory and built additions to the plant (R. 149, 157–160, 283, 138–139).[5]

The net result of all these maneuvers was that by the time of the trial Tomlinson was managing the business substantially in the same way as in 1938.

(2) *The status of the workers.*—After October 22, 1938, the workers were required to sign the articles of partnership as a condition of retaining their jobs (R. 250, 267–268). The workers were paid through so-called "drawing accounts," which were expressed in terms of hourly rates of pay (R. 152, 45–77), and were admittedly "substantially the same" as the wages which they previously received from the corporation (R. 295). In addition it was stipulated that except for a few minor changes the workers performed the same duties after October 24, 1938, as before (R. 43). Defendant Thompson on occasion changed the rates of pay (R. 144). In addition, he fixed the hours of work just as he had in the

[5] Throughout the greater part of the period here involved the defendant corporation filed tax returns, sworn to by defendant Tomlinson, in which the personal property in the plant (raw materials, goods, and materials in process, manufactured articles on hand) was listed as property of the corporation (R. 124–128; pltf. ex. 12A, B, C; 13A, B, C; R. 347–359). The 1940 return stated that the corporation's business was the manufacturing of boxes (pltf. ex. 13B, R. 356).

past (R. 246, 256, 259) and the workers continued to punch time clocks (R. 161). The workers were supervised in the same manner by the same officials as in the past (R. 86, 137, 138), including Tomlinson (R. 185, 223, 265).

They were also hired and fired by defendants without regard for their formal position as partners. The senior partners had authority to admit new partners to membership (R. 86). In order to obtain "partners" the company on occasion advertised for "help wanted" in the usual manner (R. 213–214).[6] Persons applying for jobs were told they had to sign the partnership agreement (R. 177, 231, 240, 259, 217, 218). Workers were discharged for stealing chickens, smoking contrary to rules, loafing or being a poor workman (R. 134–137), and even because a former employee was coming back (R. 215–216). The original partnership agreement provided that the senior partners could "terminate" the sublease and the partnership as to any member of the firm whose conduct was found to be "unworkmanlike" or "disloyal" (R. 86, 300). Subsequently these powers were vested in the Board of Control, which

[6] In seeking a stenographer, the company advertised for "help wanted," not for a partner (R. 214). The applicant was offered $12.00 a week, and required to sign an application for membership as a partner a few days after starting work (214–215). When the girl who had formerly held the job wished to come back, five months later, the new "partner" was notified that her services were no longer needed (R. 215–216).

was authorized to "sever" the relationship of a partner with the firm (R. 94, 108). In the agreement settling the strike of August 1941 the workers were given some additional protection through a provision that a partner should not be separated except by a secret vote of the partnership or by the unanimous agreement of the Board of Control and an Adjustment Committee created by the agreement (R. 116–117).

The portion of the profits originally allocated to the junior partners, 10%, was to go only to those who had worked 600 or more hours in the calendar year, with the senior partners (later the Board of Control) having complete discretion to determine the allocation (R. 88–91). After the change in the lease whereby, in lieu of 70% of the profits, 5% of the gross sales was to be paid to the Plymouth Corporation as rental before net profits were computed, the proportion of the profits allotted to the workers was of course increased (R. 77–81, 380–381).[7] During 1938 and 1939 there had been no profits (R. 381). For 1940 the participating workers (approximately 100 in number) received an average of $14.26 each and for 1941 $14.63[8]—payments which the Indiana

[7] The "Return to Work Agreement" of September 2, 1941, deprived Tanner, Wolfarth, Warren, and Thompson of their preferential rights in the distribution of profits (R. 114). The 600-hour limitation was apparently eliminated at the same time (R. 208).

[8] Computed from Schedule B of the stipulation of facts (R. 77–81). Tanner, Wolfarth, Warren, and Thompson received $339.10 each in 1940 and at least $176.35 in 1941 (*ibid.*).

Appellate Court has characterized as in the nature of a bonus. *In re Zeits,* 108 Ind. App. 617, 637–638, 31 N. E. (2d) 209, 217.

A number of employees offered to testify that they did not intend to become partners and signed the agreement only to obtain jobs (R. 184, 219, 235–236, 257, 262).[9]

The facts surrounding the strike occurring in the summer of 1941 show the nature of the relationship between the workers and the managers, including Tomlinson. The workers struck for a five cent per hour wage increase, and proposed a contract between the company, through its Board of Control, and the workers represented by a C. I. O. local (R. 42, 111–113).[10] A leader of the workers, Pierce, was told by Tomlinson that "he would bring charges against me through the committee and have me fired out of the place" (R. 169). Tomlinson also told the strikers to "go on home and get out" (R. 170) and Thompson subsequently told Pierce he was "fired" (R. 171). The strikers' committee negotiated with Tomlinson alone. One of them testified (R. 221)—

> we figured that he was the overseer of this place. It was his factory, that is the way we figured it.

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[9] This testimony was excluded by the trial court, but error was assigned to the exclusion (R. 415–417).

[10] The workers' view of their own status appears from their description of the dispute as a disagreement "between those engaged in production and those engaged in management * * * regarding their relationship" (R. 112).

Tomlinson did nothing to dispel this impression; he replied to the request for the wage increase "I won't give it, you can go home" (*ibid.*). After five weeks the strike was settled through the intervention of the Indiana State Department of Labor (R. 115–117). The settlement agreement provided that five cents per hour should be added to the "drawing account" rate but that Tomlinson, as trustee, could decline to approve the increase to the extent he deemed advisable (R. 114–115).

The District Court found on these facts that the workers were partners and not employees of the corporation, of Tomlinson, or of Tanner, Wolfarth, Warren, and Thompson. Accordingly it held that they were not subject to the Fair Labor Standards Act (R. 406–409).[11] The Circuit Court of Appeals affirmed, on the ground that the findings of the District Court that the workers were not employees of the defendants were not "clearly erroneous" (R. 429–435).

REASONS FOR GRANTING THE WRIT

Through the devices of a lease, a sublease, a pseudo-partnership and a contract for the protection of "creditors," respondents have contrived to exclude from the protection of the Fair Labor Standards Act the persons who worked in their plant. This result has been achieved although there has been no change of consequence in what

[11] Shipment in interstate commerce and violation of the statutory standards was conceded by respondents (R. 39–41).

the workers do, in how much they are paid, or in how they are supervised, on the one hand, or in the powers exercised over them by Tomlinson and his four subordinates, on the other. It is important that a decision sanctioning this means of nullifying a remedial statute be overturned.[12] The decision is contrary to the terms and purposes of the Fair Labor Standards Act, in conflict with principles repeatedly applied by this Court in enforcing other statutes, in conflict with a decision of the First Circuit Court of Appeals involving a similar scheme under the Fair Labor Standards Act (*Fleming* v. *Palmer,* 123 F. (2d) 749, certiorari denied, 316 U. S. 662), and in conflict with a decision of the Appellate Court of Indiana as to

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[12] The importance of the problem is not limited to the Fair Labor Standards Act. Respondents' plan has also resulted in litigation with the Commissioner of Internal Revenue over the application of Titles VIII and IX of the Social Security Act (R. 369–373; *Tomlinson* v. *Smith*, 128 F. (2d) 808), and with the Indiana authorities over the application of the State Unemployment Compensation Act. *In re Zeits*, 108 Ind. App. 617, 31 N. E. (2d) 209 (1941); *Thompson* v. *Travis*, 46 N. E. (2d) 598 (Ind. 1943). Indeed the form of application for membership states that applicants "realize" that they will not be entitled to protection under these statutes as well as the Fair Labor Standards Act (R. 373–375).

The Deputy Commissioner of Internal Revenue has ruled in a considered opinion (R. 369–373) that the workers are employees of Wolfarth, Tanner, Warren, and Thompson, acting as partners, for purposes of the Social Security Act, but the Seventh Circuit has refused to dismiss a suit brought by Tomlinson, as trustee, to restrain the collection of Social Security taxes. *Tomlinson* v. *Smith*, *supra.* The suit is now awaiting trial in the District Court, pending final disposition of the instant case.

the status of respondents' own plan (*In re Zeits*, 108 Ind. App. 617, 31 N. E. (2d) 209 (1941)).[13]

1. It is our position that the workers were employees within the meaning of the Fair Labor Standards Act, and that throughout the entire period in question, and certainly after the trustee contract of July 1941, Tomlinson was their employer. His control was exercised largely individually, but also through his Plymouth Corporation, the original employer, which leased the property to, provided funds, capital equipment

[13] Both courts below relied in part upon a decision of the Marshall County Circuit Court sustaining respondents' contentions with respect to the application of the Indiana Unemployment Compensation Act (R. 398–404, 407–408, 434). That action was brought by defendant Tanner and another against defendant Thompson and other partners. The decision of the Circuit Court, which was directly contrary to the prior determination of the Indiana Appellate Court in the *Zeits* case, was reversed by the Supreme Court of Indiana on the ground that the proceeding was collusive; the opinion of the Supreme Court stated "The whole proceeding seems to be a self-serving device by which the members of the so-called partnership, plaintiffs and defendants, are seeking an adjudication that they are not indebted for the tax in the absence of the taxing agency." *Thompson* v. *Travis*, 46 N. E. (2d) 598, 599.

Although the decisions of the Indiana Appellate Court and Supreme Court were called to the attention of the court below before argument (see appellant's brief below (pp. 18–19)), its original opinion failed to mention them but referred only to the Circuit Court decision. Only at the time rehearing was denied (R. 437) did the court amend its opinion to note that the Circuit Court decision had been reversed "on the ground that declaratory judgment was an improper remedy" (R. 434).

and supplies for, and received the largest portion of the income of, the operating company. During the period that Tomlinson or the corporation, or either of them, was the employer, Tanner, Wolfarth, Warren and Thompson were clearly persons "acting directly or indirectly in the interest of an employer in relation to an employee", within the meaning of the definition of employer in Section 3 (d) of the Fair Labor Standards Act. If, for any portion of the time in question, Tomlinson or the corporation were not employers, Tanner, Wolfarth, Warren and Thompson, acting together as co-partners or otherwise, were. If Tomlinson as trustee was not the employer himself, he was acting in the interest of the employer, whether it be the corporation, Tanner, Wolfarth, Warren and Thompson as "senior partners" or as dominating members of the Board of Control.

The District Court held that the workers were not employees at all but partners (R. 406–411). The Circuit Court of Appeals, in affirming, left open the possibility that the workers might have been employees of a partnership consisting mainly of themselves (R. 435), but held that they were not employees of any of the respondents. It is true that if attention be directed primarily to the form of the contracts rather than to the substance of the transactions as a whole, there may be difficulty in determining who was the employer at any particular moment. But we believe that the court below should not have been

so exacting in imposing upon the Administrator the task of determining precisely under which shell respondents had concealed the employer. If, as we think is clear, the workers were employees and not managers of a business or self-employers, all those under whom they worked and who were party to the scheme should be subjected to an injunction against violating the Fair Labor Standards Act.

2. (a) Even apart from the statutory definitions discussed below, the workers in this case were employees and not partners. It is clear from the facts set forth in the Statement that their position, insofar as control, supervision, pay, and job tenure were concerned, did not differ from those of employees or workers generally. Furthermore, as the Indiana Appellate Court has held,[14] many of the criteria of partnership were missing. The respondents, not the workers, managed the business. The workers are not parties to a contract of "mutual agency," in which each partner can act on behalf of the others; they had no right to act as principals or to bind the partnership to the slightest extent. Cf. *Karrick* v. *Hannaman,* 168 U. S. 328, 334; *Meehan* v. *Valentine,* 145 U. S. 611; *Lindley* v. *Seward,* 103 Ind. App. 600, 620, 5 N. E. (2d) 998, 1006 (1937). The small sums distributed to the employees were more in the nature of a bonus than an allocation

[14] *In re Zeits, supra,* p. 14, and *infra,* p. 22.

of profits (*in re Zeits, supra*); in any event, mere sharing in profits does not make one a partner.[15]

Many courts have held that the realities of the employment relationship are to be given effect in determining the scope of legislation for the benefit of employees, without regard for paper devices used to make the relationship look like something else.[16] These principles have been applied to

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[15] *Meehan* v. *Valentine*, 145 U. S. 611; *D. Buchanan & Son* v. *Ewell*, 148 Va. 762, 139 S. E. 483 (1927); *Seeman* v. *Eneix*, 272 Mass. 189, 172 N. E. 243 (1930); *Winters* v. *Miller*, 227 Mich. 602, 199 N. W. 642 (1924); *Bershad* v. *Roshke*, 196 N. Y. Supp. 548 (1922); *Kalb* v. *Leff*, 138 Misc. 830, 246 N. Y. Supp. 158 (1930); *Wagner* v. *Buttles*, 151 Wis. 668, 139 N. W. 425 (1913); *Canton Bridge Co.* v. *City of Eaton Rapids*, 107 Mich. 613, 65 N. W. 761 (1895); *W. F. Bleck & Co.* v. *Soeffing*, 241 Ill. App. 40 (1926); *Bond* v. *May*, 38 Ind. App. 396, 78 N. E. 260 (1906); *Breinig* v. *Sparrow*, 39 Ind. App. 455, 80 N. E. 37 (1907). See Uniform Partnership Act, Sec. 7 (4) (7 Uniform Laws Ann., 13).

[16] *Commonwealth* v. *Weinfields, Inc.*, 305 Mass. 108, 25 N. E. (2d) 198 (1940) (lessor-lessee arrangement designed to avoid State maximum hour law); *Kaus* v. *Huston*, 35 F. Supp. 327 (N. D. Iowa) (lessor-lessee device to evade Social Security Act); *Utility Coal Co.* v. *Rogez*, 170 Okla. 264, 39 P. (2d) 60 (1935) (cooperative organized to avoid State workmen's compensation law); *People* v. *Famous Infants Knitwear Corp.*, 172 Misc. 842, 18 N. Y. S. (2d) 167 (1939) (independent contractor agreement to avoid home work law); *People* v. *Beatty*, 171 Misc. 1004, 14 N. Y. S. (2d) 260 (1939), and *People* v. *Levine*, 160 Misc. 181, 288 N. Y. Supp. 476 (1936) (partnership devices to circumvent workmen's compensation law); *Scott* v. *Miller*, 260 App. Div. 428, 22 N. Y. S. (2d) 981 (1940), affirmed, 285 N. Y. 760, 34 N. E. (2d) 910 (1941) (partnership arrangement to evade the unemployment compensation law); *Rogers* v. *Danaher*, Super. Ct., Hartford Co., Conn., March 19, 1940 (joint venture to avoid unemployment compensation law); *Montello Granite Co.* v. *Industrial Comm.*, 227 Wis. 170, 278 N. W. 391 (1938) (part-

schemes to evade the Fair Labor Standards Act.[17] And this Court has frequently enunciated the same doctrine in effectuating the purpose of other statutes. *Gregory* v. *Helvering,* 293 U. S. 465; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic Association,* 247 U. S. 490, 501; *Anderson* v. *Abbott,* decided March 6, 1944 (Slip Sheet, pp. 9–10). It will not permit itself "to be blinded or deceived by mere forms * * *" but will deal "with the substance of the transaction involved" (*ibid.*).) See *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* decided March 27, 1944 (slip sheet, p. 1).

It is important that this Court review a decision refusing to give effect to these accepted principles and thereby opening up a method of escape from the Fair Labor Standards Act. The statutory objective of protecting an industry against the competition of employers operating under substandard labor conditions (Section 2; *United States* v. *Darby,* 312 U. S. 100) cannot be achieved if an employer can avoid compliance with the statutory minima by designating his employees as "partners."

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nership device to evade workmen's compensation law); *People* v. *Curiale,* 171 Misc. 264, 12 N. Y. S. (2d) 464 (1939) (partnership arrangement to avoid State minimum wage law).

[17] *Fleming* v. *Palmer,* 123 F. (2d) 749 (C. C. A. 1), certiorari denied, 316 U. S. 662. *Walling* v. *American Needlecrafts, Inc.,* 139 F. (2d) 60 (C. C. A. 6); *Southern Railway Co.* v. *Black,* 127 F. (2d) 280 (C. C. A. 4); *Cole* v. *Harker & Crouch* (W. D. Penn., No. 34, October 10, 1939, unreported).

(b) Even if the workers be regarded as partners for purposes of the law of partnership—as we think they clearly cannot be[18]—they would be employees for purposes of the Fair Labor Standard Act. The Act applies to employers and employees, but it contains its own definitions of those terms. Section 3 (g) defines "employ" as including "to suffer or permit to work." Section 3 (d) provides that "employer" shall include "any person acting directly or indirectly in the interest of an employer in relation to an employee." These definitions plainly encompass this case. Section 3 (g) in particular was referred to by a legislative sponsor of the Act as the "broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657). The object of the broad definition was obviously to bring within the Act all workers who are controlled by and perform work for the benefit of another, irrespective of whether they would come within a strict common law definition of the master-servant relationship. *Walling* v. *American Needlecrafts, Inc.*, 139 F. (2) 60, 63–64 (C. C. A. 6); *Glenn* v. *Beard*, decided March 20, 1944 (C. C. A. 6).[19] The nar-

[18] See p. 16, *supra*.

[19] In the latter case, which is unreported, the court stated:

> In the *Needlecrafts* case, however, the controlling factor was the broad statutory definition of employ. "'Employ' includes to suffer or permit to work." Title 29 U. S. C. A. sec. 203 (g). * * * The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work.

row concept of employment embodied in the decision below is inconsistent with the interpretation given the Act by the Sixth Circuit in the above cases. It is important for this Court to determine which of these interpretations shall prevail.

3. The decision below is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Fleming* v. *Palmer,* 123 F. (2d) 749, certiorari denied, 316 U. S. 662. The *Palmer* case involved a scheme to evade the Fair Labor Standards Act strikingly similar to the scheme adopted in this case. Palmer had been engaged in the manufacture of handkerchiefs, employing many homeworkers in his business. After the enactment of the Act and before its effective date, in order to avoid the necessity of complying with it, he induced his employees to form an incorporated cooperative. There were a board of directors and various committees, on which the workers were eligible to serve, but Palmer effectively retained control of the business by securing for himself, his wife, and his brother-in-law positions of importance in the cooperative. This control was implemented, as here, by leases and loan agreements whereby Palmer financed the cooperative and provided the buildings and equipment; this placed him in the position of a controlling creditor with power to administer the enterprise until the "debt" was repaid (123 F. (2d), at 758). A striking parallel exists between Palmer's position and Tomlinson's, and between Palmer's board of directors and the

senior partners and Board of Control in the instant case. Nor is there any substantial difference between the use of a cooperative and a partnership as a means of transforming employees into self-employers.

The District Court found that Palmer was not the employer, within the meaning of the Act, of the members of the incorporated cooperative. The Circuit Court of Appeals rejected this finding, stating that the issue was whether the business was "controlled by the Palmers or * * * by the workers? If the cooperative is controlled by the Palmers then the simple, economic fact is that the members are working for the Palmers and hence are employees of the Palmers and the cooperative within the meaning of the Act" (123 F. (2d), at 751). The court pointed out that "Congress in passing the Act was dealing with economic realities", and concluded (pp. 761–762):

> * * * Palmer possessed extraordinary powers. Whatever powers he might possibly have lacked were lodged in the group of employees most naturally inclined to be favorable to him. The history of the formation and operation of the cooperative, the articles of incorporation and the by-laws do not reveal an industrial democracy governed by workers.
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> * * * * *
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> * * * Palmer controls the cooperative and these workers. The economic fact is

> that they are working for him. The method of paying the workers does not weaken this conclusion. * * *
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> * * * We have been forced to conclude that the district judge's finding that the workers and not the Palmers controlled the business and this cooperative is against the clear weight of the testimony and must be set aside.

The Circuit Court of Appeals thus held that not the formal legal relationship but substantial economic control determined the existence of the employer-employee relationship under the Fair Labor Standards Act.

Although there are differences between the details of the arrangements in the *Palmer* case and this one, the net results of the two plans was the same. In each case—after all the documents had been signed—the original employer, in one capacity or another, retained control of the enterprise and the conditions of the workers remained unchanged.

The decision below is also in conflict with the decision of the Indiana Appellate Court in *In re Zeits,* 108 Ind. App. 617, 31 N. E. (2) 209 (1941), which dealt with the applicability of the Indiana Unemployment Compensation Act to respondent's plan. The *Zeits* case, decided before Tomlinson resumed control of the enterprise as "trustee," held that the Plymouth Manu-

facturing Company was a partnership composed of the senior partners, and subsequently of the Board of Control, and that it was an employer subject to the Indiana statute. In reaching the decision the court carefully examined the requirements of the law of partnership (108 Ind. App., at 635–640), and concluded that the workers were not partners.

4. Where the "ultimate conclusion involve[s] questions of law inseparable from the particular facts to which they are applied" the rule that this Court will not review the concurrent findings of fact of two lower courts does not prevail. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404. In this case there are no disputed facts, and the "findings of fact" of the district court in the main constitute only statements of its ultimate conclusions (R. 406–409). In the circumstances, these reflect legal rather than factual determinations, and this Court is in as good a position to decide them as were the courts below.

Furthermore, the two-court rule does not apply in case of "clear error," [20] or where the factual

[20] *E. g. Baker* v. *Schofield*, 243 U. S. 114, 118; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4; *Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks*, 281 U. S. 548, 558; *District of Columbia* v. *Pace*, decided January 10, 1944. See in particular *Beyer* v. *LeFevre*, 186 U. S. 114; *Darlington* v. *Turner*, 202 U. S. 195; *Schneiderman* v. *United States*, 320 U. S. 118.

decision of itself has important effects,[21] or where there are conflicting rulings in the circuit courts of appeals on similar statements of fact.[22] This case, we submit, falls in all three of these categories. In *Fleming* v. *Palmer, supra,* the First Circuit set aside findings of the district court of the same sort as those involved here as "clearly erroneous." The failure to set aside the findings below will lead to the multiplication of attempts to evade the Fair Labor Standards Act by such devices. The sanctioning of such schemes in the Seventh Circuit alone would in itself engender the unfair competition which the Act was designed to prevent.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

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APRIL 1944.

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[21] Compare *Schneiderman* v. *United States*, 320 U. S. 118; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, decided March 27, 1944; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Anderson* v. *Abbott*, decided March 6, 1944.

[22] *E. g. Thomson Co.* v. *Ford Motor Co.*, 265 U. S. 445, 447; *Concrete Appliances Co.* v. *Gomery*, 269 U. S. 177, 180.

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